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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EMERSON ELECTRIC CO.,
Petitioner,

v.

JANET SWENSON,
Respondent.

MOTION AND BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 36.1, the Chamber of Commerce of the United States, American Home Appliance Manufacturers (AHAM), Gas Appliance Manufacturers Association (GAMA), National Electrical Manufacturers Association (NEMA), National LP-Gas Association (NLPGA), Portable Power Equipment Manufacturers Association (PEMA), and Toy Manufacturers of America (TMA) hereby seek leave to file the accompanying brief as amici curiae in support of Emerson Electric Co.'s petition for certiorari. Counsel for petitioner has consented to the filing of the brief. The consent of counsel for respondent was requested but not obtained.

The amici are nonprofit organizations that represent a broad range of business interests affected by the Consumer Product Safety Act (CPSA):

—The Chamber of Commerce of the United States represents a cross-section of the business community throughout the United States.

—AHAM represents 26 major and 38 portable appliance manufacturers engaged in the manufacture of products for kitchens, home laundry, personal care, and home comfort.

—GAMA has approximately 230 members who are engaged in the manufacture of gas and oil furnaces, gas boilers, gas and electric water heaters, gas controls, gas ranges, and direct heating equipment.

—NEMA has 550 members who are engaged in the manufacture of electrical equipment, including components and end-use equipment for the generation, transmission, distribution, control, and use of electricity.

—NLPGA is composed of 4,000 members representing producers, transporters, wholesalers, and retailers of liquified petroleum gas, and manufacturers and distributors of associated equipment and appliances.

—PPEMA has 23 members who are engaged in the manufacture of chain saws, brush cutters, handheld and backpack blowers, and related products.

—TMA has 255 members who are engaged in the manufacture of toys, games, and ornaments.

The interest of the amici in the petition for certiorari derives from the urgent need to clarify their members' rights and liabilities under Section 23 of the CPSA, 15 U.S.C. § 2072.

Many of the amici's members manufacture consumer products and are subject to the substantial product reporting requirements prescribed by Section 15(b) of the CPSA. For this reason, many of the amici's members have been named in suits brought under Section 23 of the CPSA. In these actions, private plaintiffs have asserted a cause of action under Section 23 for alleged violations of the reporting obligations embodied in the CPSC regulations implementing Section 15(b).

The decision of the Minnesota Supreme Court recognize a private remedy under Section 23 for alleged noncompliance with the CPSC interpretative regulations under Section 15(b). The amici believe their members would be exposed to unnecessary and unjustified litigation if the decision below is allowed to stand. At a time of rising public concern about the mushrooming costs of product liability litigation, allowing personal injury plaintiffs to invoke the private remedy provisions of the CPSA could have a serious adverse impact on the manufacturers and sellers of consumer products that the amici represent.

For the foregoing reasons, the amici curiae seek permission to file the accompanying brief in support of the petition for writ of certiorari.

Respectfully submitted,

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QUESTION PRESENTED

Whether interpretative regulations issued by the Consumer Product Safety Commission to explain the reporting requirements of the Consumer Product Safety Act constitute a rule or order whose violation gives rise to a private right of action under Section 23 of the Act.

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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This amici curiae brief is submitted by seven business and trade organizations in support of Emerson Electric Co.'s petition for a writ of certiorari to review the decision of the Minnesota Supreme Court.

OPINIONS BELOW

The opinions below are properly listed in and appended to the petition for a writ of certiorari.

JURISDICTION

The amici adopt the petitioner's statement of jurisdiction.

STATEMENT OF THE CASE

The amici adopt the statement of petitioner.

INTEREST OF AMICI

The amici are seven business and trade organizations that represent industries engaged in producing and marketing products used by consumers. The amici's members are subject to Section 15(b) of the Consumer Product Safety Act (CPSA), which requires manufacturers, distributors, and retailers of consumer products to notify the Consumer Product Safety Commission (CPSC) if they obtain information which provides a reasonable basis to conclude that a product contains a defect which could create a substantial product hazard. 15 U.S.C. § 2064. Increasingly, manufacturers and sellers of consumer products have been named as defendants in private suits seeking damages under Section 23 of the CSPA for alleged violations of the CPSC regulations construing Section 15(b). The amici are deeply disturbed about this trend, and have a strong interest in clarifying whether their members can be held liable in private litigation for noncompliance with the CPSC interpretative regulations under Section 15(b).[1]

SUMMARY OF ARGUMENT

The lower court's decision should be reviewed because, if allowed to stand, it will engraft new and unauthorized remedies on a federal regulatory statute and undermine longstanding principles of administrative law. Section 23 of the CPSA limits private damage suits to "violations" of "rules or orders." Although violations of statutory provisions such as Section 15(b) are outside the coverage of Section 23, the decision of the lower court circumvents this limitation by recognizing a private remedy for noncompliance with CPSC regulations interpreting the statutory reporting duty. The effect of this

[1] The amici do not intend to address whether the petitioner fulfilled its reporting obligation under Section 15(b) in this case. The amici have joined in this brief only to address the legal issues the petition raises.

holding is to give nonbinding regulations the force and effect of law, thereby violating the well-established doctrine that interpretive regulations are unenforceable.

The decision of the Minnesota Supreme Court also should be reviewed because of its far-reaching practical implications. The dramatic explosion in product liability litigation is one of the most pressing problems facing manufacturers and sellers of consumer products. If permitted to stand, the decision of the lower court will aggravate this problem by needlessly expanding the remedies available to product liability plaintiffs, creating additional incentives for suit, and increasing the cost and complexity of litigation. Because these developments would undermine the growing movement to bring needed reform to the tort compensation system, there is a compelling need for this Court to clarify whether private litigants can maintain damage suits for alleged violations of the CPSA's reporting requirements.

ARGUMENT

I. THE DECISION OF THE LOWER COURT SHOULD BE REVIEWED BECAUSE IT DISTORTS THE ENFORCEMENT SCHEME ESTABLISHED BY CONGRESS AND IMPOSES NEW AND UNAUTHORIZED OBLIGATIONS ON MANUFACTURERS.

In violation of established administrative law principles, the decision of the court below converts regulations that the issuing agency considered nonbinding into enforceable requirements. If allowed to stand, the decision will seriously distort the regulatory scheme established by Congress and retroactively impose new obligations on manufacturers of consumer products.

The lower court recognized that noncompliance with Section 15(b) could not provide the basis for a private damage suit because the private remedy created by Section 23 is available only for alleged violations of CPSC

rules or orders (App. 17a).[2] However, the court then permitted private claimants to seek damages for alleged nonreporting on the basis of the CPSC regulations, 16 C.F.R. Part 1115, which construe the Section 15(b) reporting requirement. In essence, the court found that these regulations are "rules" which can be "violated" for purposes of Section 23.[3]

At the time it issued the regulations, the Commission stressed that they would be strictly interpretive in character:

> The Commission considered the difference between promulgating the rule as substantive and interpretive, sought public comments on the issue at the public hearings in April and May of 1978, and has decided to promulgate the rule as interpretive.

43 Fed. Reg. 34,990 (Aug. 7, 1978) (quoted at App. 2f). The Commission emphasized that, in contrast to a substantive rule, "an interpretive rule offers guidance as to what a law means, but does not itself have the force and effect of law." *Id.*

Under this Court's decisions, an interpretive rule such as 16 C.F.R. Part 1115 may clarify how the agency views the law, but it is not legally binding. *See, e.g., Chrysler Corporation* v. *Brown*, 441 U.S. 281, 301-02 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 424-26

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[2] References to "App." are to the Appendix to the petition for a writ of certiorari filed by Emerson Electric Co.

[3] An article critical of the *Swenson* court analysis has noted that "there can be no *violation* of an interpretive rule per se; what appears to be a violation of an interpretive rule is in fact a violation of the underlying statute . . . ." Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 MINN. L. REV. 955, 968 (1986) (emphasis in original). The article, which extensively examines the implications of basing a private right of action on violation of interpretive rules, concludes that "there can be no violation, and, by extension, no private cause of action for a violation, of an interpretive rule." *Id.* at 969.

(1977). A court construing the statute may seek the benefit of the agency's experience and judgment as reflected in an interpretive rule, but conduct that departs from the rule will be unlawful only if the court concludes that the statute itself has been violated.

By holding that the CPSC's regulations construing Section 15(b) can provide a basis for damage awards, the decision below accords these regulations the force and effect of law. This result directly conflicts with the Court's repeated recognition that interpretive regulations are nonbinding and, in and of themselves, cannot give rise to enforceable duties and liabilities.

The availability of a private remedy for alleged reporting violations would fundamentally reshape the enforcement scheme that Congress established when it enacted the CPSA.[4] Although Congress limited the private remedy provisions of Section 23 to violations of rules and orders, private litigants could seek damages for noncompliance with statutory requirements merely because the Commission has issued interpretive regulations explaining how those requirements should be applied. Thus, the Commission's publication of nonbinding guidelines to assist the regulated community in understanding Section 15(b) would create far-reaching liabilities in private suits that otherwise would not exist.

Equally troubling, since the Commission's regulations would constitute binding "rules" for purposes of Section 23, they would be enforceable by private litigants in damage actions even though the CPSC could not enforce the regulations directly in suits against manufacturers.

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[4] As one commentator has noted: "The statutory scheme of the CPSA indicates that Congress did not intend to create a private cause of action for violations of rules that the Commission chose to promulgate as its interpretation of the reporting requirements of section 15(b)." Note, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 MINN. L. REV. at 978.

It is plainly irrational to permit private litigants to enforce regulations that the Commission itself could not enforce, since the role of private litigants in implementing the statutory scheme is necessarily more limited than that of the Commission.

The lower court's holding that the Commission's regulations are enforceable in private suits threatens to alter dramatically the role of the regulations in day-to-day compliance with Section 15(b). At the time of their promulgation in 1978, the Commission specifically acknowledged that firms "charged with violating section 15 through acts which are contrary to these rules will always have an opportunity to urge the reasonableness of [their] actions under the circumstances, thereby defeating the accusation." 43 Fed. Reg. 34,990 (App. 3f). Because of this assurance, amici and their members did not seek judicial review of the regulations even though several of their provisions reflected a questionable interpretation of Section 15(b). The decision of the lower court effectively nullifies the ability of manufacturers and sellers to challenge the agency's interpretation of the statute in individual cases by declaring—with little explanation or analysis—that the CPSC regulations represent "a reasonable interpretation of the CPSA" and therefore should receive "authoritative effect" in private damage suits (App. 25a). This holding retroactively changes the character of the CPSC's regulations, and imposes new obligations on manufacturers, by giving the regulations a binding effect they were never intended to have.

The distortion of a federal regulatory statute created by the lower court's interpretation of Section 23, and the court's disregard of basic administrative law principles, provide important reasons why this Court should grant review.

II. THE AVAILABILITY OF A PRIVATE RIGHT OF ACTION FOR BREACH OF THE CPSC INTERPRETIVE REGULATIONS UNDER SECTION 15(b) HAS FAR-REACHING IMPLICATIONS FOR PRODUCT LIABILITY LITIGATION.

In recent years, personal injury litigation involving consumer products has mushroomed dramatically.[5] This trend has been accompanied by an explosive growth in litigation costs and damage awards.[6] In response to these developments, insurance premiums have risen steeply and insurance coverage for some products has ceased to be available.[7] Widespread concern has been expressed about

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[5] According to a recent report by a presidential task force, the number of product liability cases filed annually in the federal courts has increased 758 percent since 1974. *See* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 45 (Feb. 1986).

[6] The size of jury verdicts awarding compensatory and punitive damages has increased astronomically in many areas of tort law. *See* Report of the Tort Policy Working Group, *supra*, at 47. The average product liability jury verdict rose from $393,580 in 1975 to $1,850,452 in 1985, a 370 percent jump. *See* Jury Verdict Research, Inc., *Injury Valuation: Current Awards Trends*, No. 304 (1986).

[7] The presidential task force assigned to examine the crisis in insurance availability and affordability cited reports by the Toy Manufacturers of America, the Association of Home Appliance Manufacturers, the National LP-Gas Association, the Portable Power Equipment Manufacturers Association, and other trade associations indicating that their members have had increasing difficulty obtaining insurance in view of the dramatic increase in the number and amount of product liability awards. *See* Report of the Tort Policy Working Group, *supra*, at 10-13. For example, the outdoor power equipment manufacturers have experienced premium increases of from 50 percent to 70 percent during 1985, with some renewals ranging 400 to 600 percent higher than last year. *Id.* at 13. As a result of the high cost and unavailability of insurance, nearly one-quarter of the transporters of liquified petroleum gas have been forced to operate with less than the $5,000,000 in insurance coverage that federal law requires for motor carriers. *Id.* at

the crisis in the insurance and tort compensation systems, and reform of product liability law has gained increasing acceptance as a means of controlling litigation costs and limiting the size of damage awards.[8]

The private remedy upheld by the decision of the court below will exacerbate the crisis in product liability law and undercut efforts to reform the tort compensation system. Despite widespread recognition of the need to limit the potential liability of manufacturers and sellers, the decision below would significantly expand the range of legal theories on which liability can be based by permitting damage awards for nonreporting or late reporting under Section 15(b) of the CPSA. Moreover, such reporting violations could be alleged whenever the defendant manufactures or sells a consumer product which is claimed to be defective but was not the subject of a timely report under Section 15(b). Since a wide range of products can be classified as "consumer products" under the Act,[9] and since the CPSC's regulations interpreting Section 15(b) are broadly framed, claims under Section 23 could be included in virtually any product liability suit.

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11. Manufacturers of household appliances have found the availability of insurance curtailed significantly in recent years, and the Association of Home Appliance Manufacturers recently lost the group coverage it obtained in 1983. *Id.* at 10.

[8] These proposals are reflected in the recent report of the presidential task force on insurance availability and the large number of pending legislative proposals to establish a national product liability law. Several members of Congress have proposed legislation to help remedy the proliferation in product litigation. *See, e.g.*, S. 2046, 99th Cong., 2d Sess. (1986) (Litigation Abuse Reform Act of 1986 introduced by Sen. McConnell); H.R. 4504, 99th Cong., 2d Sess. (1986) (Federal Product Liability Act introduced by Rep. LaFalce); H.R. 4425, 99th Cong., 2d Sess. (1986) (Product Liability Uniform Standards Act introduced by Rep. Roth); S. 1999, 99th Cong., 2d Sess. (1985) (Product Liability Voluntary Claims and Uniform Standards Act introduced by Sen. Danforth).

[9] 15 U.S.C. § 2052(a).

Substantial incentives exist for product liability plaintiffs to augment their common law claims with allegations of reporting violations under the CPSA. Under the doctrine of pendent jurisdiction, plaintiffs asserting Section 23 claims would be entitled to litigate in federal court not just issues arising under the CPSA but common law tort claims that normally could be heard only in state courts.[10] Moreover, Section 23 of the CPSA specifically authorizes the recovery of attorneys' and expert witness fees as well as litigation costs—a potential windfall which is not available in conventional tort suits, where fees and costs typically are deducted from any damage award on the basis of negotiated "contingency" arrangements.

These inducements for invoking Section 23 have not escaped notice by the plaintiffs' bar.[11] Since the first reported decision upholding a nonreporting claim in 1981, the number of cases under Section 23 has steadily mounted, and scores of Section 23 suits have been filed against the amici's members.

In addition to expanding the potential liability of manufacturers and sellers, the assertion of Section 23 claims would complicate greatly the trial of product liability cases. Since the cause of action recognized by the lower court is predicated on an alleged violation of the CPSC

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[10] Of the eight reported decisions construing the scope of Section 23, only *Swenson* was issued by a state court; the remainder were decisions of federal district courts.

[11] An article in the monthly publication of the American Trial Lawyers Association, for example, urged plaintiffs' attorneys in product liability actions to include a count in their complaints (or amend existing complaints to add a count) alleging a private cause of action under the Act. *See, e.g.*, Babij, *Industry Fails to Report Product Hazards*, TRIAL, Oct. 1984, at 62. Similar articles have appeared in other publications. *See, e.g.*, Epstein, *Failure to Warn*, TRIAL, April 1986, at 67; Karon, *Application of the CPSA and Proof of Failure to Warn in Product Liability Actions*, MINN. TRIAL LAW., Jan.-Feb. 1985, at 8; Gilbert, *Target Product Update*, Leader's Product Liability Newsletter, April 1986, at 5.

regulations interpreting Section 15(b), the focus of a Section 23 case necessarily would be on the defendant's compliance with the detailed procedures, interpretations, and recommendations adopted by the Commission to provide guidance to industry.[12] As a result, judges with no regulatory experience would be responsible for explaining a complex administrative scheme to lay juries, who then would have to use that scheme to evaluate the conduct of defendant manufacturers.[13]

Complicating the task of judges and juries would be the two-stage inquiry necessary to determine whether liability should be imposed under Section 23. Even if the evidence shows that the defendant violated the Section 15(b) reporting duty, it must be demonstrated that the plaintiff's damages were *caused* by this failure to report. Establishing this causal connection will require evidence that, if a timely report had been filed, the Commission would have ordered remedial measures that would have removed the defendant's product from the stream of commerce, alerted users to possible risks, or otherwise prevented the plaintiff's injury.

The Commission can require repair, replacement or public notice concerning defective products only if it makes the findings specified in Sections 15(c) and (d) of the CPSA after conducting an adjudicative hearing

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[12] For example, the regulations provide illustrations of the kinds of information that firms should evaluate in determining whether they have a duty to report (16 C.F.R. § 1115.12(e)); examples of products that the Commission considers "defective" (16 C.F.R. § 1115.4); and criteria the Commission may use to determine whether a defect presents a substantial product hazard (16 C.F.R. § 1115.12(f)).

[13] In some cases, plaintiffs have sought to introduce the testimony of ex-CPSC employees with "expertise" in applying the Commission's Section 15(b) regulations, but some courts have held such testimony inadmissible on the ground that it usurps the role of the judge and jury. *See Payne* v. *A.O. Smith Corp.*, 627 F. Supp. 226, 228 (S.D. Ohio 1985).

and evaluating the whole record.[14] Thus, judges and juries in a Section 23 case would have to interpret and apply not just the CPSC regulations construing Section 15(b), but the statutory and administrative provisions governing remedial action as well. Here too, judges and juries would be required to determine complex questions of fact and law that Congress committed to an expert administrative agency. Moreover, predicting the Commission's probable course of action in response to a Section 15(b) report would require multiple speculations about a variety of difficult issues that judges and juries are ill-equipped to address.[15]

The complex factual issues raised by Section 23 claims would necessarily broaden the scope of evidence that is discoverable and perhaps admissible in product liability actions. In order to prove that the defendant was in possession of information that was reportable under Section 15, the plaintiff may insist on pursuing broad-ranging discovery concerning all phases of the design and safety history of the defendant's product as well as the defendant's decision-making process on safety issues. Much of this evidence might be inadmissible in a normal product liability case because it does not involve occur-

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[14] The submission of a report under Section 15(b) would not, in and of itself, result in remedial action. The statute and the regulations encourage companies to report safety problems that "may" present a substantial product hazard, even if in fact, after a full evaluation, no substantial product hazard would be found by the Commission. *See* 43 Fed. Reg. 34,999. Before the Commission can require corrective action under Section 15(c) or (d), substantial evidence must be presented that a product in fact contains a "defect" which "creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2).

[15] Even in the best of circumstances, the prediction of Commission behavior is subject to a large margin of error. It depends on variables such as overall Commission priorities, the predilections of individual commissioners, and the availability of agency resources.

rences similar to the accident at issue.[16] Moreover, where a report was filed with the CPSC but the plaintiff alleges it was untimely, communications between the defendant and the Commission and internal CPSC documents also would be an obvious target for discovery. These increased discovery burdens would add to the time, effort and expense necessary to resolve product liability claims.

For these reasons, the private cause of action recognized by the court below has disturbing implications for the trial of product liability cases which merit the attention of this Court. Granting the petition for a writ of certiorari would enable the Court to examine the legal basis for a new remedy that threatens to impose additional liabilities and litigation costs on a tort compensation system that is already seriously overburdened and in urgent need of reform.

III. THIS CASE OFFERS THE COURT A RARE OPPORTUNITY TO CONSIDER THE EXISTENCE OF A PRIVATE RIGHT OF ACTION FOR VIOLATION OF CPSC INTERPRETIVE GUIDELINES.

As a result of the interlocutory appeal permitted by the Minnesota courts, this case provides a rare occasion to determine whether private litigants have a right to sue for violation of the reporting requirements interpreted by the CPSC regulations. Although Section 23

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[16] In ordinary product liability cases, courts are extremely careful to guard against the danger of "diverting the jury's attention from the instant occurrence and confusing the issues." *Johnson* v. *Amerco, Inc.*, 877 Ill. App. 3d 827, 42 Ill. Dec. 684, 409 N.E.2d 299, 315 (1980). *See also Uitts* v. *General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974) (plaintiff precluded from offering reports of 35 other accidents because of potential for "unfair prejudice, consumption of time and distraction of the jury to collateral matters"). Courts also carefully circumscribe plaintiffs' attempts to rely on evidence of warranty returns and other field performance complaints absent proof that the complaints regarding the other products are similar. *See Eickelberg* v. *Deere & Co.*, 276 N.W.2d 442, 445 (Iowa 1979).

claims have been asserted in numerous product liability cases, the opportunities for appellate review have been limited because most of the cases have been settled before trial or tried but not appealed. Thus, if the Court declines to grant review now, there may be no additional opportunity to consider the issue in the near future.

In view of the split in authority in the lower courts, further development of the case law is not likely to clarify the private remedy provisions of the CPSA, and the absence of guidance from this Court will increase the confusion and uncertainty among lower courts and litigants. Because the scope of Section 23 has far-reaching consequences for product liability litigation, the Court should take the opportunity that this case offers to render a definitive ruling on this important issue of federal law.

CONCLUSION

For the foregoing reasons, the amici urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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